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No. 81-2382

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

GARY D. SMIDDY,

Petitioner,

vs.

DUDLEY D. VARNEY, SIDNEY J. NUCKLES and RAYMOND D. INGLIN,

Respondents.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether City Police Officers who provide their investigative file concerning a suspected crime to a separate and independent county prosecutor's office, who act non-maliciously and non-recklessly but whose investigation may later be found by a jury to have been conducted negligently, are liable under 42 USC 1983 for damages emanating from the independent judgment of the prosecutor's office to file and prosecute criminal charges.

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TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The United States Court of Appeals for the Ninth Circuit having ordered remand of the issue raised by the Cross-Petition of Petitioner Gary Smiddy, to the District Court for further proceedings, Respondents Dudley D. Varney, Sidney J. Nuckles and Raymond D. Inglin submit that the Cross-Petition

for Writ of Certiorari need not be entertained by this Court at the current stage of the proceedings.

INTRODUCTION

Petitioner's complaint in the District Court alleged among other things that respondent police officers maliciously initiated criminal proceedings against him, however, he never presented sufficient evidence to establish this allegation. Instead, petitioners evidence in the trial below at best demonstrated that the officers were negligent in investigating him. Because the evidence was thus insufficient to permit damages after the institution of the criminal proceedings by the District Attorney, respondents moved for a directed verdict and later

for a new trial and judgment notwithstanding the verdict on this issue, all of which were denied by the trial court. Respondents also attempted to persuade the trial court to give an instruction upon the respective function of the police and District Attorney, however, this instruction was rejected.

Although the decision of the Court of Appeals poses issues which should be resolved by this Court, respondents believe that by vacating and remanding the District Court judgment the Court of Appeals achieved the appropriate disposition of the specific narrow question raised in the Cross-Petition for Writ of Certiorari. This is not to say that the Courts holding achieves what respondents feel should be the

correct ultimate disposition of this matter. Respondents petitioned for Certiorari on the basis of their disagreement with much of the Circuit Court's opinion. Petitioner however, did not in any event, produced evidence sufficient to render the respondent police officers liable for malicious prosecution or to show that the officers rather than the District Attorney initiated the criminal prosecution of which petitioner complained in the trial court. The Court of Appeals thus correctly vacated the judgment as to this specific issue.

SUPPLEMENTAL STATEMENT OF THE CASE

In 1976 petitioner filed an action in the United States District Court for

the Central District of California pursuant to 42 U.S.C. §1983 alleging that he was arrested and incarcerated by the respondents in violation of his rights under the First, Fourth, Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments. (C.T. 3, C.T. 91) His First Amended Complaint asserted that the respondents negligently, intentionally, wilfully, maliciously and in bad faith deprived him of numerous rights including:

> "(a) The right to unrestricted ability to travel, as well as the rights of movement and association, all secured by the First and Fourteenth Amendments to the Constitution of the United States;

"(b) The right to be secure in his person and effects against unreasonable searches and seizures under the Fourth and Fourteenth Amendments to the Constitution of the United States;

"(c) The right to be confronted by the witnesses against him, and to have the assistance of counsel for his defense under the Sixth and Fourteenth Amendments to the Constitution of the United States;

"(d) The right not to have cruel and unusual punishments inflicted upon him under the Eighth and Fourteenth Amendments to the Constitution of the United States;

"(e) The right to freedom from unlawful arrest and from unlawful detention and imprisonment as secured by the Fourth and Fourteenth Amendments to the Constitution of the United States;

"(f) The right not to be deprived of life, liberty or property without due process of the law, and the right to equal protection of the laws secured by the Fourteenth Amendment to the Constitution of the United States;

"(g) The right to be secure in his person without unlawful encroachments upon his privacy and life, as secured by the First, Fourth, Ninth and Fourteenth

Amendments to the Constitution of the United States." (C.T. 98-99)

In paragraph 19 of his First Amended Complaint petitioner alleged "that the formal institution of criminal proceedings against the plaintiff and the decision of the judge of the Municipal Court to hold the plaintiff to answer in Superior Court were the direct and proximate results of the negligent, malicious, intentional and bad faith actions of defendants DUDLEY VARNEY, SIDNEY J. NUCKLES, RAYMOND INGLIN. . ." (C.T. 95.) Respondents denied every allegation in this paragraph. (C.T. 112.)

Respondents answered the complaint denying that they had violated any rights of petitioner (C.T. 111-112). In

various affirmative defenses asserted within the answer, respondents contended that they were duly appointed police officers engaged in the performance of their regularly assigned duties as police officers, that there existed probable cause to arrest and detain the plaintiff, and that their acts were lawful, proper, reasonable, and legal. (C.T. 113.)

Among other things, respondents raised as an affirmative defense that they at all times acted in good faith without malice and within the scope of their duties as police officers of the City of Los Angeles. (C.T. 113.) The scope of the duties of police officers in California does not entail the filing or prosecution of criminal cases.

(Tribulski v. County of Los Angeles (1978) 83 Cal.App.3d 828.)

The trial of this case involved in its final analysis the award of damages against these police officers for what a jury ultimately determined to be negligence. It is important in this regard to remember that the central contentions of the petitioner and the instructions to the jury did not require that liability be based upon a showing of reckless or intentional misconduct by the officers. (Cross-Petition Appendix A-3, A-4, 22 R.T. 3867, 24 R.T. 4151-55) In the trial of the case petitioner attempted to show that the police investigation of his involvement in the murder of Linda Miller was conducted negligently and the instructions of the

trial court revolved around the issue of whether or not the police officers had been negligent. (24 R.T. 4151-55) The evidence at trial would indicate that although some facts pointed to the petitioner as a suspect others detracted from this proposition (Cross-Petition Appendix A-3, A-4). Although a good deal of scientific evidence was examined during the investigation the petitioner argued that respondents Varney and Nuckles should have examined two items of scientific evidence more carefully. (Cross-Petition Appendix A-4). Finally the petitioner argued that the officers were remiss in not pursuing all avenues of the investigation that may have been open to them at the time they were investigating him. Specifically he

listed a number of other potential suspects which he contended the officers should have more fully investigated. (Cross-Petition Appendix A-4, A-5)

The contentions of the parties at trial concerning the conduct of the officers, revolving around dizzing investigative schedules, twelve hour work days, and seven day work weeks closely resembled an action for professional malpractice in the conduct of an extensive and complicated homicide investigation.

The petitioner sought damages for attorneys fees, bail bond costs, emotional distress etc., resulting from the District Attorney's determination to prosecute the petitioner and the Municipal Court's determination to hold

him to answer for the charges. (23 R.T. 3950:12 - 3965:3.) The petitioner did not and could not show that the officers possessed any control over the ultimate decisions of the District Attorney or the Municipal Court Judge.

Under the trial court's charge to the jury, once the jury had decided upon liability it was permitted to award damages against the officers for the emotional distress occasioned by the actions of the District Attorney and the Municipal Court and further, for expenses for attorneys fees, bail, and other costs associated with his criminal prosecution. (24 R.T. 4158-59)

ARGUMENT

I.

THIS CASE POSES NO NOVEL OR UNPRECENDENTED PRINCIPLES BUT SIMPLY SETS FORTH WELL ESTABLISHED COMMON LAW RULES CONCERNING LIABILITY FOR INSTITUTION OF JUDICIAL PROCEEDINGS

What cross-petitioner has termed a new immunity is simply the application of a principle long established in the common law. That is that when a person simply relates what he or she knows concerning suspected criminal activity to a prosecutor and such a prosecutor acts upon this information exercising his or her independent judgment, such conduct, without more, cannot be a basis

for liability resulting from the criminal prosecution. Stated another way the determination to file a criminal complaint made by the District Attorney's Office was an independent, intervening, superceding act insulating respondents from liability for any damage suffered by the petitioner thereafter.

Respondents moved for a directed verdict, a new trial, and judgment notwithstanding verdict on this ground in the trial court. (C.T. 274, 341-42)1/ Even assuming arguendo that the evidence would have been sufficient to

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1/Respondents also contended in their motions for directed verdict, new trial and judgment notwithstanding verdict that the decision of the municipal court judge that petitioner be held to answer insulated them from liability for damages. (C.T. 274-75, 342.)

support a finding by a reasonable jury that petitioner's arrest was without both probable cause and a reasonable belief that probable cause existed, it seems to respondents that it was still error for the district court to deny these motions.

For respondents to incur liability for damages suffered by petitioner after the district attorney filed the criminal complaint, there must be substantial evidence that respondents instigated the filing of the criminal complaint, that is, did more than merely state what they believed, leaving the decision to prosecute entirely to the uncontrolled discretion of the district attorney's office. (See Ames v. United States (8th Cir. 1979) 600 F.2d 183, 185-86; Mundy

v. State of Georgia (5th Cir. 1978) 586 F.2d 507, 508; Dellums v. Powell (D.C. Cir. 1977) 566 F.2d 167, 192-93; Rodriguez v. Ritchey (5th Cir. 1977) 556 F.2d 1185, 1193 (en banc); Hoffman v. Halden (9th Cir. 1959) 268 F.2d 280, 296-97; Everett v. City of Chester (E.D. Pa. 1975) 391 F.Supp. 26, 28; Restatement (Second) of Torts (1977) section 653, Comment (d), pp. 407-08; Prosser, The Law of Torts (4th ed. 1971) 836-37; see also Annotation (1952) 21 A.L.R.2d 643, 662-65, 674-79.) Because there was no substantial evidence to support a finding by a reasonable jury that respondents instigated the filing of the criminal complaint, the issue of respondents liability in the trial below should at best have been limited to

damages accruing from the time of arrest to the time of the filing of the complaint and should not have included damages resulting from decisions of the prosecutor and judge over which the officers could not possibly have had any control.

II.

THE COURT OF APPEALS VACATION OF THE DISTRICT COURT JUDGMENT ON THIS ISSUE APPROPRIATELY DISPOSED OF THE ISSUE CONCERNING LIABILITY FOR INSTITUTION OF JUDICIAL PROCEEDINGS.

The development of the common law in a number of American jurisdictions recognized a complete immunity for police officers for the limited activity

of presenting information to a prosecutor who therafter passed upon whether or not a criminal case should be filed. Such an immunity was often regarded as quasi-judicial in its origins since it was conceived to carry forth the same policy of encouraging the fearless submission of issues for resolution by the Courts, as that governing prosecutors and judges. (See for example the reasoning articulated in Imbler v. Pachtman 424 U.S. 409, 428; 47 L.Ed.2d 128, 142; 96 S.Ct. 984 (1977) including the concurrence of Justice White, Id. 424 U.S. 437-39, 47 L.Ed.2d 148-49; Pearson v. Ray 386 U.S. 547, 554; 18 L.Ed.2d 288, 294; 87 S.Ct. 1213 (1967); see also Restatement (Second) of Torts (1977) §653, comment (e), p.408.)

Treatises addressing the subject of the extension of quasi-judicial immunity to police officers when engaged in the presentation of their investigations to the prosecutor provide that although there exists a split of authority the better reasoned rule has supported such an immunity:

> "In the great majority of cases the civil liability of a law enforcement officer has been determined by the decision of whether or not the doctrine of judicial immunity extends to such type of public officer.
>
> While there is a direct conflict of authority on this point, the better view seems

to be that the doctrine is applicable to law enforcement officers and that they therefore are immune from liability for malicious prosecution even though they may have acted maliciously and without probable cause.

The reason for the above-stated rule is that public policy requires that law enforcement officers be protected from harassment by civil actions in the performance of their duty, the efficient functioning of the law enforcement machinery being dependent largely upon the investigation and the

accusation of offenders by properly trained officers."

Annotation, Civil Liability of Law Enforcement Officers For Malicious Prosecution, 28 A.L.R. 2d 646, 649 (1953)

"Prosecuting attorneys themselves, when they merely conduct proceedings on complaints sworn out by others, are held to be quasi-judicial officers, protected by an absolute privilege, and are not liable for malicious prosecution even when they act in bad faith and without probable cause, or overdo the prosecution. The same

immunity is, in general, extended to the police and other law enforcement officers acting within the scope of their duties."

Prosser, Law of Torts, (1971) Ch. 22, Malicious Prosecution §119, p. 837-38

A large number of American cases have followed this rule. (See for example White v. Towers (Cal. 1951) 37 Cal.2d 727, 235 P.2d 209, 28 ALR 2d 636 and cases cited therein and Annotation 28 ALR 2d 646.) However, even those which have not, have never rested liability for the institution of judicial proceedings upon so precarious a footing as did the District Court in

this case. Even in Belt v. Ritter (Mich, 1969) 18 Mich. App. 495, 171 N.W.2d 581; aff'd. 385 Mich 402, 189 N.W.2d 221, a leading Michigan decision rejecting the application of quasi-judicial immunity to police officers engaged in official duties involving the institution of judicial proceedings the court held that a defendant in such a case must be shown to have acted with malicious motives before liability can attach for such acts. The case concluded that:

> "It would thus appear that the only situation in which an action for malicious prosecution would properly lie is where a police officer swears to false facts in a

complaint, without which there is no probable cause."

Belt v. Ritter (1968) 18 Mich App. 495, 171 N.W.2d 581, 586

The present case revolving as it does upon mere negligence simply does not reflect the type of malicious or intentional misconduct which must be proven even in those jurisdictions which permit liability against police officers for malicious prosecution.

III.

THE ISSUE OF THE LIABILITY OF THE RESPONDENTS FOR DAMAGES AFTER INSTITUTION OF JUDICIAL PROCEEDINGS WAS PROPERLY RAISED AND LITIGATED BELOW.

Relying upon Gomez v. Toledo 446 U.S. 635, 64 L.Ed.2d 573, 100 S.Ct. 1920 and Rule 8(c) of the Federal Rules of Civil Procedure, petitioner complains that respondents did not allege as an affirmative defense the fact that the filing of a criminal complaint by the district attorney's office was an independent, intervening, superseding act insulating them from liability for any damage suffered by petitioner thereafter.

It was not necessary for respondents to allege this as an affirmative defense because it was not "avoiding in nature in that it raises matter outside the scope of plaintiff's prima facie case." (2A Moore's Federal Practice (2d ed. 1979) para. 8.19[1],

p.8-221.) The law is clear that the chain of causation between respondents and the filing of the criminal complaint is broken if the decision made by Deputy District Attorney who decided to file a criminal prosecution was independent, and it is presumed that it was independent. (See Ames v. United States (8th Cir. 1979) 600 1.2d 183, 185; Dellums v. Powell (D.C. Cir. 1977) 566 F.2d 167, 192-93.) In order to recover damages arising after the filing of the criminal complaint, it was incumbent upon petitioner to allege and prove that respondents did not leave the decision to prosecute entirely to the uncontrolled discretion of the District Attorney's Office. This obligation was recognized by petitioner; his complaint

alleged "[t]hat the formal institution of criminal proceedings against the plaintiff . . . [was] the direct and proximate result[] of the negligent, malicious, intentional and bad faith actions of defendants. . . ." (C.T. 95:1-6.) The allegation was denied by respondents in their answer to petitioner's complaint. (C.T. 112:19-21.) They also alleged that they acted properly within the scope of their duties as police officers. (C.T. 113) Respondents need not have done more. "[A] defense that merely controverts plaintiff's prima facie case is negative in character and is made, in accordance with subdivision (b) [of Rule 8], by the denial of some or all of the averments upon which plaintiff relies." (2A

alleged "[t]hat the formal institution of criminal proceedings against the plaintiff . . . [was] the direct and proximate result[] of the negligent, malicious, intentional and bad faith actions of defendants. . . ." (C.T. 95:1-6.) The allegation was denied by respondents in their answer to petitioner's complaint. (C.T. 112:19-21.) They also alleged that they acted properly within the scope of their duties as police officers. (C.T. 113) Respondents need not have done more. "[A] defense that merely controverts plaintiff's prima facie case is negative in character and is made, in accordance with subdivision (b) [of Rule 8], by the denial of some or all of the averments upon which plaintiff relies." (2A

Moore's Federal Practice, supra, para. 8.19[1], pp. 8-220 - 8-221; footnotes omitted.)

Even if respondents were required to allege the independence of the prosecutor's filing decision as an affirmative defense this contention would be immaterial in the instant case since the issue was tried by express or implied consent. (3 Moore's Federal Practice, supra, para. 15.13[2], p. 15-165; see Gallegos v. Stokes (10th Cir. 1979) 593 F.2d 372, 374-75; Slavitt v. Kauhi (9th Cir. 1967) 384 F.2d 530, 534, and cases cited.) Petitioner broached the subject of the independence of the prosecutor's action during the trial in his case in chief during the testimony of one of the police officers. (5 R.T.

672:17 - 673:9.) Then respondents' counsel asked the officer questions on this subject without objection by petitioner. (6 R.T. 939:11 - 943:12.) Thus, the issue was tried by implied consent.

In addition, respondents' motion for directed verdict very clearly stated that the prosecutor's independent action insulated defendants from liability for damages accruing thereafter. (C.T. 274.) This afforded petitioner an opportunity to present any additional evidence on this subject. To afford such an opportunity is the principle rationale for the rule that sufficiency of the evidence is not reviewable on appeal unless a motion for directed verdict was made at the close of all the

evidence by the party seeking that review.

> "When a claimed deficiency in the evidence is called to the attention of the judge and of counsel before the jury has commenced deliberations, counsel still may do whatever can be done to mend his case."

(Quinn v. Southwest Wood Products, Inc. (5th Cir. 1979) 597 F.2d 1018, 1024-25.) Petitioner did not take advantage of the opportunity to "mend his case." One can only assume the case was not "mendable." There plainly was no evidence to support a finding that respondents interferred with the District Attorney's exercise of discretion and the Court of Appeals correctly ruled that the presumption of

independant judgment of the prosecutor had thus not been rebutted.

CONCLUSION

For the foregoing reasons respondents submit that the arguments raised in the Cross-Petition for Writ of Certiorari in this matter are simply not meritorious. The Cross-Petition for Writ of Certiorari should be denied.

Dated: August 13, 1982

Respectfully submitted,

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